No. 10-355

IN THE

Supreme Court of the United States

Pella Corporation and
Pella Windows and Doors, Inc.,

Petitioners,

v.

Leonard E. Saltzman, et al.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a court errs by certifying a Rule 23(b)(3) class, where it finds that common questions predominate, if the class certification is limited to these common questions.

2. Whether a court errs by certifying a Rule 23(b)(2) class for final declaratory relief where some class members might later pursue additional equitable relief.

3. Whether a court certifying a Rule 23(b)(2) class necessarily errs by analyzing the underlying state laws for consistency after certification rather than before.

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INTRODUCTION

The district court's order in this case consisted of an unremarkable finding that class certification was warranted because the plaintiffs had satisfied the requirements of Rule 23. In a careful opinion, the court identified a set of common factual and legal questions among the plaintiffs' claims that it held predominated over individual questions. It also found that the petitioners, Pella Corporation and Pella Windows and Doors, Inc. ("Pella"), had acted on grounds that apply generally to the plaintiff class. The Seventh Circuit (Judges Posner, Williams, and Tinder) granted Pella's request for interlocutory review not because it identified anything noteworthy in the district court's order but rather, it stated, because it wished to address—and reject—Pella's broad argument that consumer fraud claims are never appropriate for class treatment. Again in this Court, Pella seeks to establish a *per se* rule that consumer fraud claims are always inappropriate for class treatment, irrespective of predominance and superiority, thereby denying discretion to district courts to resolve consumer fraud claims by class treatment even where Rule 23 is satisfied.

Specifically, Pella asserts that the Seventh Circuit waded into a dispute among the appellate courts regarding the use of "issue" classes. In support, Pella cites decisions from other circuits addressing whether courts may certify classes for "particular issues" under Rule 23(c)(4) even if the certification requirements of Rule 23(b) have not been met. The Seventh Circuit, however, took no position on this question. It had no need to because the district court held that common questions predominate over questions affect-

ing individual class members and that Rule 23(b)(3) is thus satisfied.

Pella also offers this Court a novel interpretation of Rule 23(b)(3). According to Pella, certification is categorically impermissible if individual causation questions must be addressed in subsequent proceedings, regardless of the particular circumstances in the case. The Seventh Circuit's refusal to embrace this interpretation allegedly "departed from the path other courts have followed in addressing these important class-action questions." Pet. 2. Yet Pella identifies no opinion from any court that adheres to its categorical interpretation of the Rule. This Court is not the proper venue for Pella to test-drive novel interpretations of the Federal Rules.

With respect to certification of the Rule 23(b)(2) class, Pella argues that the declaratory relief sought is unacceptably "non-final" because of the possibility that individual warranty disputes might still occur after the relief is granted. Pella again posits a novel and categorical interpretation of the Rule, arguing that (b)(2) certification for declaratory relief is impermissible if subsequent individual disputes might occur. Pella's premise is incorrect: the declaratory relief sought for this (b)(2) class constitutes final relief, notwithstanding the possibility that Pella may later dispute individual class members' warranty claims. More importantly, Pella offers no evidence of any conflict among the circuits regarding the "finality" of declaratory relief under Rule 23(b)(2) and cites no decision espousing its interpretation of the Rule.

Finally, Pella argues that the Seventh Circuit erred by affirming a Rule 23(b)(2) certification that occurred before the district court analyzed the laws

of the fifty states. But Pella is unable to identify a single decision requiring courts to undertake such analysis before (b)(2) certification. Instead, Pella exclusively cites opinions addressing (b)(3) certification, which has distinct criteria.

STATEMENT OF THE CASE

Respondents filed a consumer fraud class action against Pella, a manufacturer of aluminum-clad casement windows sold under the "ProLine" brand name. Respondents allege that Pella fraudulently concealed a known design defect that allows water to migrate behind the aluminum cladding into the wood of the window structure, causing wood rot that is normally undetectable by the consumer until a total failure of the windows, and reducing the windows' useful life to as few as three years. After Pella was deluged with complaints from its distributors—who had to replace the rotting windows of their customers and purchase those replacements from Pella at their own cost—it created a ProLine Customer Service Enhancement Program ("PSEP") to mitigate the replacement costs for distributors and to compensate those customers who repeatedly complained. Although Pella created the PSEP because of the design defect, Pella did not inform its customers about the existence of the defect or of the PSEP, and it did not inform prospective customers of the defect. Pet. App. 1a-2a, 46a-47a, 49a.

Proceedings Before the District Court

Plaintiffs brought suit, alleging that Pella committed consumer fraud by failing to inform customers about the design defect, its role in causing rot, and the PSEP. The parties agreed to conduct discovery in

two phases. Phase I focused on matters relating to class certification under Rule 23. If class certification were granted, Phase II would focus on the merits of respondents' claims. During Phase I discovery, Pella consistently resisted requests for documents that implicated causation, arguing that causation was a merits issue that was irrelevant to class certification. For instance, Pella objected to a discovery request for documents regarding "testing of aluminum clad windows to determine . . . potential causes of any wood deterioration" on the ground that "this is a classic merits issue of causation that does not reach numerosity, commonality, typicality, or adequacy of representation." Plaintiffs' Reply Memorandum in Opposition to Defendants' Response to Plaintiffs' Motion for Class Certification, 2-3. During a status conference, addressing respondents' attempts to obtain these documents, Pella likewise stated that "we do believe causation is a Phase II issue." *Id.*

At the conclusion of the first phase of discovery, respondents asked the district court to certify three nationwide classes: one for declaratory relief under Rule 23(b)(2), one for monetary relief under Rule 23(b)(3) on an unjust enrichment theory, and one for statutory consumer-fraud damages under Rule 23(b)(3). With respect to the proposed 23(b)(3) classes, respondents suggested, in the alternative, certification of subclasses comprising individual states. Pet. App. 51a, 74a.

The court certified the 23(b)(2) class, finding that respondents had alleged that Pella acted on grounds applicable to the class as a whole by "failing to disclose material facts about the defect, and by secretly creating and implementing the PSEP and by not applying it consistently." *Id.* at 71a. The court's order

allows the class to seek six declarations that establish Pella's concealment of a known design defect and secret modification of its warranty, and entitle every class member to disclosure of the defect, lifting of the time limit on Pella's warranty for wood-rot claims, notice of this change to the warranty, reassessment of any previous warranty claims based on wood rot that Pella had denied, free inspection for wood rot upon request, notice of this inspection program, and the right to have any warranty coverage dispute adjudicated by a special master. *Id.* at 48a-50a n.3. This class encompasses owners of ProLine windows that have not yet manifested the defect or have not yet been replaced. *Id.* at 83a-84a.

The court declined to certify a Rule 23(b)(3) class as to the unjust enrichment claim. The court explained that the typical remedy for unjust enrichment is restitution, measured not by the plaintiff's loss but by the value of the defendant's unjust gain and held that, in regard to this cause of action, individualized issues would dominate. *Id.* at 81a-82a.

By contrast, with regard to the proposed Rule 23(b)(3) consumer-fraud class, the court identified a set of common questions that predominated over individual questions, including:

- the scope of Pella's warranty;
- the nature of the PSEP and whether it amended the warranty;
- whether and when Pella ProLine Windows suffered from an inherent wood "durability" defect;
- whether and when Pella knew of the defect; and

- whether and when Pella publicly announced the defect and the PSEP.

Id. at 74a. The court declined to certify a nationwide 23(b)(3) class, however, finding subclasses of individual states to be more appropriate. The court examined the consumer protection statutes of the states for which the plaintiffs requested subclasses and certified 23(b)(3) subclasses for California, Florida, Illinois, Michigan, New Jersey and New York, with each subclass comprising consumers whose windows suffered the defect and have been replaced. The court determined that the consumer-fraud statute of North Carolina involved different and subjective inquiries, thus making certification for that state inappropriate. *Id.* at 62a, 74a-78a.

Because of the predominance of common questions among respondents' consumer-fraud claims, and because "trying these claims separately would result in a substantial amount of repetition," the court found class proceedings to be the superior form of adjudication under Rule 23(b)(3). The court acknowledged that damages amounts and individual causation questions (such as whether a customer's wood rot resulted from the defect or another factor such as poor installation) would need to be addressed individually, but the court found this did not negate the predominance of common questions over individual questions. *Id.* at 74a, 79a, 80a. The court also held that "[d]ue to the predominance of other issues, differences in applicable statutes of limitations do not bar class certification under Rule 23(b)(3)." *Id.* at 79a.

Proceedings Before the Seventh Circuit

Pella requested interlocutory review under Rule 23(f). In a per curiam opinion, Judges Posner, Williams, and Tinder granted review and affirmed the district court. The court of appeals identified nothing noteworthy in the district court's order but stated that it had granted review to address Pella's argument "that consumer fraud cases as a general matter are not amenable to class treatment." Pet. App. 4a.

Affirming the district court's order, the Seventh Circuit emphasized that "consumer fraud class actions present problems that courts must carefully consider before granting certification," and explained that the district court had considered and addressed precisely these concerns. *Id.* at 4a, 5a. It noted, for instance, that "[t]he narrow way in which the district court defined the classes here eliminates concern" about overbreadth. *Id.* at 7a-8a. And it affirmed the district court's holding "that the commonality requirement of Rule 23(a)(2) and the predominance requirement of Rule 23(b)(3) are both satisfied because the central questions in the litigation are the same for all class members—whether the ProLine windows suffered from an inherent defect when they left the factory, whether and when Pella knew of this defect, the scope of Pella's warranty, and the nature of the ProLine Customer Enhancement Program and whether it amended the warranty." *Id.* at 6a. The court also found no credible objections to the district court's certification of a Rule 23(b)(2) class, because the declaratory relief sought by the (b)(2) class was integral to establishing class members' entitlement to equitable relief in the form of specific performance of Pella's warranty. *Id.* at 8a-9a.

The Seventh Circuit observed that in this action, where common questions predominate, "there is an economy to class treatment" of the questions to be adjudicated by the class, "the resolution of which has the potential to eliminate the need for multiple, potentially expensive expert testimony and proof that would cost considerably more to litigate than the claims would be worth to the plaintiffs." *Id.* at 6a. It also noted that in contrast to some cases involving common issues among plaintiffs, here the accuracy of the resolution of those common issues is unlikely to be enhanced by repeated proceedings because the issues are not so complex, nor the consequences so great, "that a decentralized process of multiple trials is necessary for an accurate evaluation of the claims." *Id.*

Pella's request for rehearing or rehearing en banc was denied.

REASONS FOR DENYING THE WRIT

I. The Decision Below Takes No Position on Whether "Issue" Classes May Be Certified Under Rule 23 Without Requiring Overall Predominance, and the Decision Is Consistent with Even the Most Restrictive Interpretation of the Rule.

A. The Seventh Circuit opinion is a narrow per curiam Rule 23(f) decision addressing the single issue of whether the Circuit had adopted a categorical prohibition on class certification of consumer fraud claims. The opinion, similar to many others, found that it had not.

Seeking to broaden the scope of the brief decision below, Pella invokes a dispute among the courts

about whether "issue" classes may be certified under Rule 23(c)(4) if the "predominance" requirement of (b)(3) has not been met. Pella claims that the Seventh Circuit has now weighed in on this dispute by affirming certification of an "issue" class without requiring that common questions predominate as to the cause of action as a whole. *See* Pet. 15-17. Pella's premise is inaccurate. The Seventh Circuit did not hold that "issue" classes may be certified without an overall finding of predominance; rather, it affirmed the district court's finding that predominance exists here. Pet. App. 6a. Pella's claims to the contrary turn on mischaracterizations of the decisions below. And the circuit conflict that Pella cites is thus immaterial because the decision below did not take a position on this conflict and is consistent with even the most restrictive interpretation of Rule 23(b)(3), adopted by the Fifth Circuit.

Pella states that the decision below "exacerbates a festering circuit conflict on the propriety of 'issue' classes," Pet. 19, with the Second and Ninth Circuits purportedly disagreeing with the Fifth Circuit. The cases Pella cites, however, all address whether courts may certify a class under Rule 23(c)(4) *notwithstanding* that the predominance requirement of Rule 23(b)(3) has not been satisfied. *See Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 109 (2d Cir. 2007) ("Rule 23(c)(4)(A) is available to certify particular issues regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement.") (internal quotation omitted); *In re Nassau County Strip Search Cases*, 461 F.3d 219, 222 (2d Cir. 2006) ("Whether a court may employ Rule 23(c)(4)(A) to certify a class as to a specific issue where the entire claim does not satisfy Rule

23(b)(3)'s predominance requirement is a matter of first impression in this Circuit."); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) ("Even if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues."); *Castano v. American Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996) ("The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial.").

The question whether predominance must be satisfied for a (c)(4) issue class is not presented here because the district court, whether or not it was required to do so, found that predominance had been satisfied. Consistent with both approaches, the district court found, and the court of appeals agreed, that certification is proper because, among other things, common issues predominate:

> The district court held that the commonality requirement of Rule 23(a)(2) and the predominance requirement of Rule 23(b)(3) are both satisfied because the *central questions* in the litigation are the same for *all* class members—whether the ProLine windows suffered from an inherent defect when they left the factory, whether and when Pella knew of this defect, the scope of Pella's warranty, and the nature of the ProLine Customer Enhancement Program and whether it amended the warranty.

Pet. App. 6a (emphasis added). Nothing in the Seventh Circuit's per curiam opinion suggests that an issue class may be certified if the claim as a whole does not meet the (b)(3) standards.

The decision below thus does not merit review, because certification would be permitted here even under the Fifth Circuit's restrictive view that "issue classes" are available only when Rule 23(b) criteria are satisfied by the claim as a whole. The district court and Seventh Circuit expressly found that common questions predominate over individual questions in the action as a whole and that Rule 23(b)(3)'s requirements were met. *Id.* at 5a-6a, 73a-82a. The Seventh Circuit's decision thus does not implicate the disagreement identified by Pella.

B. Attempting to disprove this critical fact, Pella misrepresents key aspects of the district court and Seventh Circuit opinions. For example, Pella writes that "[w]ith respect to the Rule 23(b)(3) class, the court held that respondents satisfied the threshold 'commonality' requirement of Rule 23(a) based on the underlying question whether the Pella ProLine casement windows are defective." Pet. 8. While this statement suggests that the court identified only a single common issue (the existence of a design defect), the text cited by Pella reveals the breadth of the commonality finding:

> Plaintiffs maintain that common questions include the scope of Pella's warranty, the nature of the PSEP and whether it amended the warranty, whether and when Pella ProLine Windows suffered from an inherent wood 'durability' defect, whether and when Pella knew of the defect, and whether and when Pella publicly

> announced the defect and the PSEP. These are questions that are common to the class, and are allegedly a result of Pella's standardized conduct toward the class members.

Pet. App. 58a-59a, *cited at* Pet. 8.

Similarly, Pella narrowly describes the scope of the Seventh Circuit opinion: "The Seventh Circuit affirmed certification of the Rule 23(b)(3) class on the ground that the issue of 'defect' predominated, even though any individual plaintiff would still have to prove causation." Pet. 12. But the Seventh Circuit recognized that the "defect" issue is only one of many questions common to the class that together predominate over individual questions: "[T]he central questions in the litigation are the same for all class members—whether the ProLine windows suffered from an inherent defect when they left the factory, whether and when Pella knew of this defect, the scope of Pella's warranty, and the nature of the ProLine Customer Enhancement Program and whether it amended the warranty." Pet. App. 6a.

This mischaracterization goes to the heart of Pella's argument: that the Seventh Circuit affirmed certification of an "issue" class without requiring predominance of common questions. *See* Pet. 16. The court of appeals did no such thing.

Elsewhere, Pella mischaracterizes the district court's analysis of Rule 23(b)(3) by stating that "[t]he court . . . declared that the commonality analysis of Rule 23(a) essentially satisfied the predominance requirement of Rule 23(b)(3)." Pet. 8. In support of this assertion, Pella cites the court's preliminary observation that "[c]onsiderable overlap exists between the court's determination of commonality and a finding

of predominance. A finding of commonality will likely satisfy a finding of predominance because, like commonality, predominance is found where there exists a common nucleus of operative facts." Pet. App. 73a-74a. Pella, however, fails to mention that the district court followed this prosaic observation with eight pages of detailed analysis explaining why the predominance requirements of Rule 23(b)(3) are satisfied. *See id.* at 74a-82a. The court's opinion belies Pella's claim that the district court "bootstrapped" a finding of commonality under Rule 23(a) into a finding of predominance under Rule 23(b)(3), and that the Seventh Circuit "blessed that decision." Pet. 16.

In any event, Pella seeks review of the Seventh Circuit's decision, not the district court's. The Seventh Circuit's opinion nowhere suggests that a commonality determination under Rule 23(a) satisfies the Rule 23(b)(3) requirement that common issues predominate.

C. The district court defined the (b)(3) damages class to include only those customers "who have experienced a manifest defect and have paid to repair or replace th[o]se windows." Pet. App. 81a. As the Seventh Circuit stated, "the narrow way in which the district court defined the classes here eliminates the concern that definitions are overbroad or include a great many people who have suffered no injury." *Id.* at 7a-8a. Moreover, "here there is an economy to class treatment," which "has the potential to eliminate the need for multiple, potentially expensive expert testimony and proof that would cost considerably more to litigate than the claims would be worth to the plaintiffs." *Id.* at 6a.

Nonetheless, Pella argues that Rule 23(b)(3) certification was inappropriate because individual plaintiffs will later need to show that the ProLine design defect caused the rot in their ProLine windows. *See* Pet. 17. Yet the use of subsequent individual proceedings is expressly contemplated in the Federal Rules. As the Advisory Committee Notes to Rule 23(b)(3) explain: "[A] fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, *and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class*." Fed. R. Civ. P. 23(b)(3), Advisory Committee Notes, 1966 Amendments. *See also* Pet. App. 7a (citing 5 William B. Rubenstein, Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 17.28, pp. 413-14 (4th ed. 2002)).

In apparent acknowledgement of this aspect of the Rules, Pella states that the plaintiffs will need to demonstrate that their own wood rot was caused by the inherent design defect that will have been shown to rot wood, and Pella posits a categorical rule that the need for individualized causation evidence automatically renders Rule 23(b)(3) certification inappropriate. Again, Pella contends that the Seventh Circuit's failure to adhere to this "rule" "deepened a circuit conflict." Pet. 17. The decisions on which Pella relies, however, neither espouse such a categorical rule nor provide evidence of any circuit discord.

For instance, the first case cited by Pella, *Newton v. Merrill Lynch*, 259 F.3d 154 (3d Cir. 2001), involved a private securities fraud claim under Rule 10b-5. The plaintiff investors alleged that the defendant broker-dealers violated their duty to execute trades under the most "favorable terms reasonably

available" by executing orders at a set price and failing to investigate other feasible alternatives that potentially offered better prices. The putative class included thousands of investors, and the alleged practice affected hundreds of millions of transactions. *Id.* at 162. For each of these hundreds of millions of transactions, the plaintiffs needed to demonstrate misrepresentation or omission of a material fact, scienter on the part of the defendant, reliance on the misrepresentation, and damage resulting from the misrepresentation. *Id.* at 173. In this context, the court found individual questions would predominate: "Examining millions of trades to ascertain whether or not there was injury [means] that individual issues overwhelm[] common questions among the class." *Id.* at 187.

Pella seizes on one sentence in *Newton*—"If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable," *id.* at 172—and contends that the Third Circuit adopted a categorical rule that would prevent certification here. *See* Pet. 17. But *Newton* simply represents a court applying Rule 23(b)(3) to the facts at hand. In *Newton*, the court determined that individual questions would "overwhelm" the common questions, and therefore *in that case* the "essential elements of the cause of action" could not be proven on a class-wide basis. Here, the Seventh Circuit applied 23(b)(3) to different facts and concluded that *in this case* the predominant elements *can* be proven as a class. *See* Pet. App. 5a (stating that the common and predominant questions identified by the district court were "the essence of the dispute" and were "better resolved by class treatment"). There is no interpretative disagreement between these two

opinions. The other decisions listed by Pella (without parenthetical explanation) are similarly unavailing. *See* Pet. 17.[1]

D. *Castano v. American Tobacco Co.*, on which Pella relies heavily, is likewise consistent with the Seventh Circuit's opinion. Pella states that, in *Castano*, the Fifth Circuit explained that "the predominance requirement ensures that commonality governs *a claim as a whole*." Pet. 17 (citing *Castano*, 84 F.3d at 745 n.21 ("[A] cause of action, as a whole, must satisfy Rule 23(b)(3)'s predominance requirement."). What Pella fails to state is that the footnote it cites is devoted entirely to discussing the relationship between Rules 23(c)(4) and 23(b)(3), and to explaining that courts may not use 23(c)(4) to certify classes if the requirements of 23(b)(3) are not met. This discussion does not address Pella's contention that certification is categorically impermissible if causation questions must be addressed individually. Moreover, here, both the Seventh Circuit and the district court expressly concluded that respondents' claims, as a whole, satisfy Rule 23(b)(3) because common questions predominate. Pet. App. 5a-6a, 73a-82a. The decisions are thus in harmony with *Castano*. *Cf. Gunnells v. Healthplan Serv., Inc.*, 348

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[1] Pella's Seventh Amendment argument (Pet. 18-19) was ably refuted by the decision below. *See* Pet. App. 9a-10a. One of the most prominent opinions raising Seventh Amendment concerns about bifurcated trials, *In re Rhone-Poulenc*, 51 F.3d 1293, 1302-03 (7th Cir.1995) (Posner, J.), was authored by a member of the per curiam panel here. The panel was aware of these concerns and concluded that, under the facts of this case, the district court was correct that individual juries would not be required to reexamine facts decided by the class jury.

F.3d 417, 444-45 (4th Cir. 2003) (court "ha[d] no need to enter th[e] fray" where "even if the view adopted by the Fifth Circuit (that predominance must be established within a given cause of action to invoke (c)(4)) rather than that of the Ninth Circuit (that this is not necessarily required) constituted the law of this circuit, our holding here would be in full accordance with the Fifth Circuit view").[2]

E. Finally, Pella's argument that class certification cannot be granted because of outstanding issues regarding causation is in stark contrast to the position it consistently maintained in the district court. There, as explained above (at 3-4), Pella rebuffed discovery requests for documents related to causation, stating repeatedly and on the record that causation was a merits issue not relevant to class certification. Pella should not now be permitted to claim that causation is central to class certification.

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[2] *Castano* involved "what may be the largest class action ever attempted in federal court," 84 F.3d at 737, in which the district court certified a class comprised of "all nicotine-dependent persons in the United States . . . who have purchased and smoked cigarettes manufactured by the defendants," along with their estates, representatives, administrators, spouses, children, relatives and "significant others" as heirs or survivors, with claims going back to 1943. *Id.* The Fifth Circuit reversed largely because the district court certified the class "[w]ithout any specific analysis regarding the multitude of issues that make up 'core liability.'" The district court "did not discuss why 'core liability' issues would be a significant, rather than just common, part of each individual trial, nor why the individual issues in the remaining categories did not predominate over the common 'core liability' issues." *Id.* at 739. The contrast to the present case is self-evident.

II. The Courts of Appeals Are Not in Conflict Regarding the "Finality" of Relief Under Rule 23(b)(2).

A. Pella's objection to certification of the Rule 23(b)(2) class "is essentially the same as the point made above with respect to Rule 23(b)(3)." Pet. 23. Pella asserts that because the declaratory relief will not entitle class members to window replacement without a further showing that the defect caused their particular wood rot, the relief is not "final." *Id.* As the Seventh Circuit explained, however, Pella misapprehends the nature of the (b)(2) relief being sought. Pet. App. 8a ("Pella mischaracterizes the effect of the six declarations contemplated by the district court."). The requested declarations would constitute final relief, applicable to the class as a whole. The declaratory relief would entitle every class member to disclosure of the window defect, lifting of the time limit on Pella's warranty for wood-rot claims, notice of this change to the warranty, reassessment of any previous warranty claims based on wood rot that Pella had denied, free inspection for wood rot upon request, notice of this inspection program, and the right to have any warranty coverage dispute adjudicated by a special master. *Id.* at 48a-50a. This relief is all that respondents seek for the Rule 23(b)(2) class.

Pella argues that such declaratory relief cannot be certified under (b)(2) because, after the class members obtain the declarations, Pella might dispute a class member's later request for window replacement pursuant to warranty by arguing that the class member's wood rot was caused by some other factor. This scenario, however, does not detract from the finality of the declaratory relief, which will not

guarantee new windows for every class member but will give them notice of the defect, free inspection to ascertain if they are affected, and coverage under Pella's warranty.[3] That Pella may later dispute an individual claim made under that warranty does not alter the finality of this relief.

Furthermore, that Pella's actions might not have caused every class member's wood rot (and thus that some customers seeking window replacement under warranty may need to show an absence of other contributing factors) does not make Rule 23(b)(2) certification improper: "Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class." Fed. R. Civ. P. 23(b)(2), Advisory Committee Notes, 1966 Amendments; *see, e.g., DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1201 (10th Cir. 2010); *Baby Neal for and by Kanter v. Casey*, 43 F.3d 48, 58 (3d Cir. 1994); *Griffin v. Burns*, 570 F.2d 1065, 1073 (1st Cir. 1978). Pella's concealment of a known defect applies to the entire class, regardless of whether some class members escape injury from this concealment.

B. Moreover, Pella fails to demonstrate any circuit disagreement regarding "finality" under Rule 23(b)(2) and does not identify a single decision adher-

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[3] The Seventh Circuit imprecisely stated that "the cumulative effect" of the six declarations "will be an entitlement to have their windows replaced," Pet. App. 9a, which Pella correctly notes is not accurate. The opinion's next two sentences, however, make its meaning clear: class members will be entitled to the benefits of the warranty that Pella denied them, as well as to notice and inspection. *Id.*

ing to its interpretation of the Rule. Instead, Pella cites opinions in which (b)(2) certification was denied and implies that it was denied because the plaintiffs sought non-final relief. *See* Pet. 23-24 ("Given the plain language of Rule 23(b)(2), it is hardly surprising that the First, Fifth, and Eleventh Circuits have expressly rejected the certification of 'issue' classes seeking non-final declaratory relief under Rule 23(b)(2)."). The opinions belie this implication.

For example, in *Bolin v. Sears Roebuck & Co.*, 231 F.3d 970 (5th Cir. 2000), plaintiffs sought certification for injunctive and declaratory relief under the Bankruptcy Code, the Fair Debt Collection Practices Act, the Truth in Lending Act ("TILA"), and the Racketeer Influenced and Corrupt Organizations Act. The court determined that even if these statutes authorize equitable relief, most of the class sought only damages, and the declaratory relief they requested would serve only to facilitate a damages award. Because the class would gain nothing from an injunction and Rule 23(b)(2) permits certification only for declaratory relief that "corresponds" to injunctive relief, the court found certification improper. *Id.* at 976-79 & n.39. The denial of certification was not based on the "finality" of the relief sought nor the propriety of "issue" classes.

Likewise, *Christ v. Beneficial Corp.*, 547 F.3d 1292 (11th Cir. 2008), involved plaintiffs seeking injunctive relief under TILA. The court determined that TILA does not authorize such relief, and therefore "[b]ecause injunctive relief is not a remedy available under TILA . . . Rule 23(b)(2) certification under TILA was improper." *Id.* at 1298. Quoting *Bolin*, the court stated that since the class members could not seek injunctive relief, a class could not be

certified for corresponding declaratory relief. *Id.* at 1298 n.11 (quoting *Bolin*, 231 F.3d at 978-79). The court denied certification for declaratory relief because the plaintiffs were entitled to *no injunctive relief at all*, not because the relief they sought was insufficiently "final." The opinion does not discuss "finality" of relief or "issue" classes at all.

McKenna v. First Horizon Home Loan Corp., 475 F.3d 418 (1st Cir. 2007), also cited by Pella, did not even involve certification of a Rule 23(b)(2) class. The *McKenna* plaintiffs sought damages from their lender and rescission of their loan transactions under TILA. They also attempted to represent a class of plaintiffs seeking a "declaration that any class member who so desires may seek to rescind their transaction." *Id.* at 421. The district court certified the class under Rule 23(b)(3). *Id.* at 427. The First Circuit held that TILA rescission claims are not "maintainable in a class-action format." *Id.* at 423-26. Because a class could not seek rescission under TILA, it also could not seek a declaratory judgment entitling class members to rescission. *Id.* The court went on: "If more were needed—and we doubt that it is—the justifications for class treatment are significantly diminished when the remedy sought is a declaration of the right to rescind" because "absent class members would have the same right to seek rescission after a declaratory judgment was rendered as they had previously." *Id.* at 427. In other words, the declaratory judgment (besides being prohibited by the statute) would have no practical effect on the class members. Obviously such a class proceeding would not serve "judicial economy and efficiency," Pet. 24 (quoting *McKenna*, 475 F.3d at 427). This analysis has no bearing here, where the declaratory relief sought will

provide tangible relief to the members of the Rule 23(b)(2) class.

III. The Courts of Appeals Are Not in Conflict Regarding the Timing of State-Law Analysis Under Rule 23(b)(2).

A. Pella's final complaint is that the Seventh Circuit affirmed the district court's certification of a nationwide Rule 23(b)(2) class without first analyzing the laws of the fifty states. Pet. 25. Pella's argument is premature. Prior to certification, the district court indicated that any challenges to the substance of the requested declaratory relief would be addressed during the merits phase of the case. Dkt. 163 at 23. After the Seventh Circuit affirmed certification, Pella submitted to the district court a proposed schedule for briefing regarding the substantive law governing the declaratory judgment class. Defs.' Mot. to Set Pretrial Schedule for Issue Class Trial, 6-8. Thus, the question of what law governs the (b)(2) class and whether all class members are entitled to declaratory relief is now pending before the district court. The court might find no pertinent conflict among the states, identify subclasses, or even de-certify the (b)(2) class. Whatever the outcome, it serves no purpose for this Court to grant review now, when the district court is simultaneously reviewing the issue that Pella asks this Court to instruct that court to consider.

B. Although Pella argues that the Seventh Circuit erred in affirming Rule 23(b)(2) certification before the state-law analysis took place, Pella does not identify a single decision that holds to the contrary. Every case cited by Pella on this point addresses

state-law analysis in the context of (b)(3) certification, not (b)(2) certification.

Specifically, without exception, the passages that Pella cites comprise discussions of the "predominance" requirement of Rule 23(b)(3). *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001) ("Zinser argues that the district court abused its discretion by holding that variances in state laws overwhelm common issues of fact. . . . Understanding which law will apply before making a predominance determination is important when there are variations in applicable state law."); *Andrews v. AT&T Co.*, 95 F.3d 1014, 1023-24 (11th Cir. 1996) (reversing (b)(3) certification on manageability grounds because plaintiffs challenged "hundreds of widely differing 900-number programs" under the laws of fifty jurisdictions); *Castano*, 84 F.3d at 740, 741 (holding that the district court erred because "it failed to consider how variations in state law affect predominance and superiority," and noting that "variations in state law may swamp any common issues and defeat predominance"); *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996) ("Given the absence of evidence that common issues predominate, certification was improper. . . . The district judge also failed to consider how the law of negligence differs from jurisdiction to jurisdiction."); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1016 (D.C. Cir. 1986) ("[W]e next state our reasons for instructing the District Court to reconsider the finding that common legal questions predominate in each class certified."); *In re Asbestos School Litig.*, 789 F.2d 996, 1010 (3d Cir. 1986) (affirming certification of 23(b)(3) class for claims involving "the substantive law of many states," noting that "plaintiffs have under-

taken an extensive analysis of the variances in products liability among the jurisdictions" and that "plaintiffs have made a creditable showing . . . that class certification does not present insuperable obstacles").[4]

Pella quotes part of a sentence in *Walsh* by then-Judge Ginsburg to support its interpretation of (b)(2). *See* Pet. 26. It omits, however, the first part of the sentence, along with the previous sentence, which reveal that the court's discussion was directed to the predominance requirement of Rule 23(b)(3): "A considered *predomination* determination by the District Court, however, must be made. As the Third Circuit observed in *In re Asbestos School Litigation*, to establish commonality of the applicable law, nationwide class action movants must creditably demonstrate, through an 'extensive analysis' of state law variances, 'that class certification does not present insuperable obstacles.'" *Walsh*, 807 F.2d at 1016 (emphasis added) (citations omitted). In this case, the plaintiffs offered just such an analysis for their Rule 23(b)(3) damages claims, and the district court made precisely this type of considered determination, as the Seventh Circuit noted in affirming the decision. Pet. App. 10a.

The consensus that state-law variations are important considerations in (b)(3) class certification de-

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[4] Although *In re Asbestos School Litigation* involved a (b)(2) question as well as a (b)(3) question, the court briskly affirmed denial of a 23(b)(2) class on the ground that the class actually sought damages, not injunctive relief. *Id.* at 1008. The discussion of state-law variations, which Pella cites, occurs in a separate discussion in which the court affirmed certification of a Rule 23(b)(3) class. *Id.* at 1010.

cisions is consistent with the decision below. Indeed, the Seventh Circuit's own cases concur on this point, debunking Pella's claim of disagreement. *See Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 745-46 (7th Cir. 2008) (Posner, J.); *In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation*, 288 F.3d 1012, 1018 (7th Cir. 2002) (Easterbrook, J.).

Furthermore, (b)(2) and (b)(3) establish distinct criteria for certification. Subdivision (b)(3) applies to situations in which "class-action treatment is not as clearly called for as in those described above [under (b)(1) and (b)(2)], but it may nevertheless be convenient and desirable depending upon the particular facts." Fed. R. Civ. P. 23(b)(3), Advisory Committee Notes, 1966 Amendments. While (b)(2) may require a certain threshold of cohesiveness, because (b)(3) turns more heavily on convenience and desirability, it entails a special focus on the promotion of efficiency: "Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Id.* Manageability concerns related to variations in state law are also heightened in (b)(3) actions because these actions involve damages claims in which courts are required to instruct juries on the relevant law, potentially including subtle distinctions among the laws of numerous jurisdictions. *See Thorogood*, 547 F.3d at 746. No such concern is implicated in (b)(2) actions seeking equitable relief because the relief is crafted by a professional jurist capable of managing such legal distinctions. Thus, while variations in state law must be

analyzed in (b)(2) actions to determine whether the plaintiffs are entitled to the relief they seek, this inquiry need not be made at the certification stage in all cases.

CONCLUSION

There is a reason that the Seventh Circuit found this case to be a straightforward one, capable of resolution in a per curiam opinion. Affirming the district court did not require the Seventh Circuit to adopt any positions in tension with those of other circuits or this Court. The order affirmed by the Seventh Circuit was a context-specific determination that Rule 23's requirements were satisfied by the facts of this case. Pella seeks error correction of this fact-bound determination under the guise of resolving a circuit conflict. Examination of the pertinent decisions, however, reveals neither conflict nor error.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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